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Montana Perpetuities Legislation — A Plea for Reform¹

T. L. WATERBURY*

Relatively speaking, the law of perpetuities² affects only a handful of people, in Montana or any other state. In the main, those affected are a few well-to-do men and women, their families, their favored charities and their estate planners.³ Does it follow, then, that the lawyer in general practice can ignore the subject? Surely not. Occasionally, he will be one of the estate planners just referred to, planning for one of his best clients. And, because he is an occasional estate planner, it will be necessary for him to brush up on a number of things, including the law of perpetuities, to do a good job. Clearly, it is of particular importance to this lawyer that the local perpetuities law be as complete and comprehensible as possible. Wherever he may practice, his perpetuities refresher will be time consuming. But if he is a Montana practitioner, and his client has long-term family arrangements in mind, a truly laborious task lies ahead. Why so, and what can be done about it? The discussion which follows is addressed to these two questions. They will be considered in the order stated.

I.

Our Peculiar Law of Perpetuities

A.

Caveats

In fairness, two concessions should be made at the outset.

¹Excluding our statutes on accumulations and direct restraints on alienation. Arguably, these are part of our perpetuities legislation, but they are a separable part and we have enough to discuss without them.

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²This is not a very precise term. As used herein, it means those statutory and common law rules of the various states which limit the duration of indestructible trusts and future interests, either vested or contingent, (and, collaterally, invalidate some present interests). It does not include restrictions on either accumulations or direct restraints on alienation.

³Of course, like all generalizations, this one has its exceptions. Title examiners and creditor's counsel may encounter perpetuities problems. *Sheehan v. Michel*, 6 Cal. 2d 324, 57 P. 2d 127 (1936). Or questions may

First, perpetuities law in any of the United States⁴ is bound to be complicated. There is a basic reason why. The law of perpetuities seeks to reconcile the conceded prerogative of the property owner to control the disposition of his property with the obvious interest of society in limiting the duration of that control. The need for this reconciliation is clear enough. On the one hand, common sense dictates that one should be permitted to make reasonable provision for the support and advancement of his family. On the other, all would agree that future generations ought neither to be bound nor nurtured by the financial arrangements of a remote and domineering ancestor.⁵ But, practically speaking, such a reconciliation cannot be effected without developing some highly complex legal doctrine. This is so for at least two reasons. One is that our law of property provides the estate planner with a variety of devices for controlling the use of property from generation to generation, almost indefinitely. To be effective, the law of perpetuities must place limits upon the use of all of these devices,⁶ and this leads to complexity. Another source of complexity is the need for specific rules in this area. True, a noted English jurist of the 17th Century was willing to limit the duration of ancestral control, “. . . where-ever any

arise concerning the validity of real estate options; see Berg, Long-Term Options and the Rule Against Perpetuities, 37 Calif. L. Rev. 1, 325, 419 (1949). And the Commissioner occasionally takes an interest. *Smith's Estate v. Comm'r. of Internal Revenue* (C. A. 3d, 1944) 140 F. 2d 759.

⁴Caveat. No representations are made re Louisiana perpetuities doctrine which, being based upon the Civil Law, is somewhat unique, 6 American Law of Property § 25.88 (Whiteside ed., 1952). It would appear, however, that the Louisiana law of perpetuities is no model of simplicity; see Oppenheim, Limitations and Uses of Louisiana Trusts, 27 Tulane L. Rev. 41 (1952).

⁵These are, of course, merely some specific reasons for rendering property freely alienable in the hands of successive generations, the so-called public interest in alienability being the conventional justification for the restrictions imposed by the law of perpetuities, 4 Restatement, Property, Part I, Intro. Note (1944).

⁶Though in fact it does not. Possibilities of reverter and powers of termination are not subject to the common law rule against perpetuities in the United States, although there is some statutory regulation of them; see 6 American Law of Property § 24.62 (Leach and Tudor eds., 1952). Arguably, the exception of these interests is somewhat less important because they are reversionary; caveat, *Brown v. Independent Baptist Church of Woburn*, 325 Mass. 645, 91 N.E. 2d 922 (1950), discussed in 6 American Law of Property, op. cit. supra, Case 95. And it is at least theoretically possible to approach the effect of a long-term family trust with a long-term insurance settlement which, arguably, involves only contract rights against the insurer rather than property interests and therefore is not subject to rules against perpetuities. *Holmes v. John Hancock Mutual Life Ins. Co.*, 288 N.Y. 106, 41 N.E. 2d 909 (1942); 6 American Law of Property § 24.58 (Leach and Tudor eds., 1952).

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visible Inconvenience doth appear; . . .” But after all, you cannot tell your client that the Will you have prepared will hold water unless it is found to be socially inconvenient by the Supreme Court. Presumably, past generations of English and American lawyers have taken the same view. In any event, a good deal of detailed doctrine has been developed which distinguishes valid transfers from invalid ones with meticulous care and complicates the law of perpetuities still further.

The second concession which should be made is this. In *general theory*, our law of perpetuities is not peculiar. The heart of our perpetuities system is contained in seventeen sections of the Codes.⁸ These sections originated in New York.⁹ They were enacted in California as a part of the Field Civil Code,¹⁰ with some important modifications, in 1872.¹¹ In 1895, Montana enacted the then-current California provisions with few changes.¹² This New York legislation was also adopted, with various alterations, in a number of other states.¹³ The most conspicuous common feature of these statutes, wherever adopted, is their prohibition of the suspension of the absolute power of alienation for some period of time.¹⁴ The Montana version of this prohibition is stated generally in two of our Code sections, as follows:

The absolute power of alienation cannot be suspended, by any limitation or condition whatever, for a longer period than during the continuance of the lives of per-

⁸So said Lord Chancellor Nottingham in *The Duke of Norfolk's Case*, 3 Ch. Cas. 1, 49, 22 Eng. Rep. 931 (1682).

⁹Rev. Codes Mont. 1947 §§ 67-320, 67-321, 67-406, 67-407, 67-422, 67-511 through 67-518, 86-101, 86-105, 86-112 and 86-114.

¹⁰All of them except § 67-512 were originally derived from the New York Revised Statutes of 1830. See Rev. Stat. (1830), pt. 2, c. 1, tit. 2, §§ 13, 15, 14, 41, 23, 16, 24, 17, 18, 20, 21, 45, 55, 63 and 65 respectively.

¹¹Civil Code (New York, 1865). See §§ 186, 187, 201, 202, 216, 227 through 232, 234, 235, 274, 285, 295 and 298 respectively.

¹²The history of the California legislation is summarized in 6 American Law of Property § 25.59 (Whiteside ed., 1952). Perhaps the most important modification was the substitution of *lives in being for two lives in being* as the generally permitted period of suspension.

¹³The history of the Montana legislation is summarized in 6 American Law of Property § 25.73 (Whiteside ed., 1952).

¹⁴Arizona, California, Idaho, Indiana, Kentucky, Michigan, Minnesota, Montana, North Dakota, Oklahoma, South Dakota and Wisconsin; the District of Columbia also borrowed from the New York statutes; see 4 Restatement, Property, app. B, t. 1, para. 1 (1944). The Indiana statutes were repealed in 1945, Ind. Acts (1945) c. 216, and those of Michigan in 1949, Mich. Laws (1949) Act 38. The California and North Dakota statutes have been radically revised, Cal. Stats. (1951) c. 1463; Laws of North Dakota (1953) c. 274. For further discussion of the statutes of these jurisdictions see pages 36-40, *infra*.

¹⁵Ranging from two lives in being in New York, Real Prop. L. § 42, Pers. Prop. L. § 11, to lives in being and 30 years in Wisconsin, Wis. Stat. (1953) §§ 230.14, 230.15.

sons in being at the creation of the limitation or condition, except in the single case mentioned in section 67-513.¹⁵

Every future interest is void in its creation which, by any possibility, may suspend the absolute power of alienation for a longer period than is prescribed in this chapter. Such power of alienation is suspended when there are no persons in being by whom an absolute interest in possession can be conveyed.¹⁶

Principally upon the basis of this common feature, it is possible to classify Montana as one of a number of states which have copied the New York statutory rule against perpetuities.¹⁷

B. Peculiarities

But having conceded the foregoing, we need concede no more. If our perpetuities law is not peculiar in general, it certainly is in particular, for a variety of reasons.

1. Little Law

One is the paucity of local law. The statutes provide us with a bare skeleton and there are only five decisions of the Montana Supreme Court to assist in construction.¹⁸ Most of our perpe-

¹⁵Rev. Codes Mont. 1947 § 67-406; § 67-513, therein referred to, states a limited exception to the permitted period of lives in being, as follows:

A contingent remainder in fee may be created on a prior remainder in fee to take effect in the event that the person to whom the first remainder is limited die under the age of twenty-one years, or upon any other contingency by which the estate of such persons may be determined before they attain majority.

The New York version of this exception, contained in Real Prop. L § 42, is discussed in 6 American Law of Property § 25.17 (Whiteside ed., 1952). The result reached by our Supreme Court in the case of *In re Murphy's Estate*, 99 Mont. 114, 43 P. 2d 233 (1935) can be justified as falling within this exception. See 4 Restatement, Property, app. c. B, para. 62 (1944). The Montana court actually took the more doubtful position that there was no suspension beyond lives in being, 99 Mont. 114, 124-26. For further discussion of the Murphy case, see notes 18, 56, *infra*.

¹⁶Rev. Codes Mont. 1947 § 67-407.

¹⁷See 4 Restatement, Property, app. B, t. 4, para. 1 (1944); 6 American Law of Property §§ 25.1, 25.4 (Whiteside ed., 1952), both of which adopt this classification.

¹⁸*In re Murphy's Estate*, 99 Mont. 114, 43 P. 2d 233 (1935) appears to fall within the exception to our general rule limiting permissible suspension to lives in being which is discussed in note 15, *supra*. See also note 56, *infra*. *Hodgkiss v. Northland Petroleum Consolidated*, 104 Mont. 328 at pages 339-40, 67 P. 2d 811 (1937) appears to hold, with little discussion, that business trusts are not subject to our statutory rule. *Montana Consolidated Mines Corp. v. O'Connell*, 107 Mont. 273 at pages 281-82, 85 P. 2d 345 (1938) holds that a perpetual option of renewal in a min-

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tuities statutes have not been construed at all.¹⁹ Even a synopsis of the perpetuities problems upon which there is no Montana authority is impracticable, though a number of them are revealed in the discussion which follows.

2.

Unsettled Law

This problem, of course, is an inevitable correlative of the first.

a.

To begin with, it is very possible that, in addition to our rule against suspension of the absolute power of alienation, we have some *general* rule restricting the creation of contingent interests which do not suspend the absolute power of alienation at all.²⁰ Such an interest is created, for example, by the following transfer: O conveys land to the City of X so long as the land is maintained by the city as a public park, but if the land ever ceases to be so maintained, then over to O's son S and his heirs in fee simple. Clearly the absolute power of alienation, as defined in our statutes, is not suspended by this transfer. The City of X and S, or his successors, can at any time unite in a deed and convey the land in fee; nonetheless, S's interest is clearly contingent.²¹

It was decided in New York a good many years ago that the statutes of that state prohibited such a transfer.²² The New York Court of Appeals took the position that a contingent interest was

eral lease does not violate our statutory rule. In *re Hartwig's Estate*, 119 Mont. 359, 175 P. 2d 178 (1946) holds that a trust to endure for a period in gross of 10 years violates our statutory rule. And in *re Swayze's Estate*, 120 Mont. 546, 191 P. 2d 322 (1948) holds that a perpetual trust for the erection and maintenance of a hotel is not charitable and hence violates our statutory rule. For a discussion of the Swayze decision see Note, 23 Ind. L. J. 502 (1948). It will be observed that the Murphy case is the only one of the five that involves a long-term family trust. Accordingly, it is quite clear that any Montana draftsman seeking to create such a trust must look well beyond local authority for guidance.

¹⁹In fact, of the seventeen code sections listed in note 8, *supra*, only five of them, 67-406, 67-407, 67-422, 67-511 and 67-512 appear to have been construed in perpetuities cases. Three others, §§ 86-101, 86-105 and 86-114, are trusts statutes which also have non-perpetuities functions, and they have been construed or at least mentioned in non-perpetuities cases: see *Horsky v. McKennan*, 53 Mont. 50 at page 57, 162 Pac. 376 (1916); *Whitcomb v. Koechel*, 117 Mont. 329 at page 333, 158 P. 2d 496 (1945); In *re Strode's Estate*, 118 Mont. 540, 167 P. 2d 579 (1946).

²⁰Several of our specific statutory provisions refer to contingent as opposed to vested interests. Rev. Codes Mont. 1947 §§ 67-513, 67-514, 67-517.

²¹It satisfies our statutory definition of a contingent future interest, Rev. Codes Mont. 1947 § 67-321, quoted on page 23, *infra*, since the event is uncertain.

²²*Walker v. Marcellus & O.L. Ry. Co.*, 228 N. Y. 347, 123 N.E. 736 (1919).

void ab initio unless it was certain to vest within the period during which the absolute power of alienation might lawfully be suspended.²³ Were the Montana courts to follow this New York rule, it would be held that a contingent interest, to be valid, must be certain to vest, if at all, within lives in being. It is difficult to predict whether our courts would so hold. Our statutes vary in some particulars from those stressed by the New York court.²⁴ Further, this New York doctrine was repudiated by a California appellate court at a time when the California perpetuities statutes were, in relevant respects, analogous to the current Montana statutes.²⁵

However, Montana courts might hold our hypothetical contingent interest invalid on the quite different ground that the common law rule against perpetuities is in force in this state in addition to our statutory rule. The common law rule is, at least primarily,²⁶ a rule prohibiting the creation of contingent interests which may vest too remotely. The most widely accepted statement of it is that of Professor Gray:

“No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest.”²⁷

Clearly, S's contingent interest under our hypothetical transfer violates this rule. Hence it would be invalid. Some recent cases in the California appellate courts are persuasive authority

²³In re Wilcox, 194 N.Y. 288, 87 N.E. 497 (1909).

²⁴E.g., the measuring period under our statutes is lives in being rather than two lives in being, and R.S. (1830) § 19, referred to by the New York court as one of the sections justifying its conclusion, was omitted from our code. Logically, these differences would appear to be irrelevant, but they could be seized upon as distinguishing features.

²⁵In re Sahlender's Estate, 89 Cal. App. 2d 329, 201 P. 2d 69 (1948). Of course, the California court repudiated the New York analysis in the course of adopting another rule against remoteness of vesting, the common law rule against perpetuities. See note 29, *infra*.

²⁶There is scholarly debate as to whether the common law rule against perpetuities, or a related common law doctrine, limits the permissible duration of indestructible trusts. Cf. 2 Simes, *Future Interests* § 490 (1936); Gray, *The Rule Against Perpetuities* §§ 1-4, 235-237.4 (4th ed., 1942). It is said that the authorities favor the negative answer of Gray's treatise. 6 *American Law of Property* §§ 24.1, 24.3, 24.67 (Leach and Tudor eds., 1952). Doubtless to insure the existence of a rule restricting the permissible duration of indestructible trusts, the draftsmen of the recent California perpetuities revision included a provision prohibiting suspension of the absolute power of alienation beyond lives in being and 21 years by any sort of transfer. Cal. Civ. Code (Deering, 1949), 1953 Cum. Supp. § 715.1. For a critique of this California solution see note 133, *infra*.

²⁷Gray, *The Rule Against Perpetuities* § 201 (4th ed., 1942).

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for the view that the common law rule exists in Montana.²⁸ These cases held that rule to exist in California, along with the California statutory rule against suspension of the absolute power of alienation, and were based upon Constitutional and statutory provisions similar to those presently found in Montana.²⁹

If we do have some general rule restricting the duration of contingent interests in this state, the importance of the distinction between contingent and vested interests is increased. Hence it should be noted that we have also borrowed from New York, via California, our statutory definitions of contingent and vested future interests, viz:

A future interest is contingent whilst the person in whom, or the event upon which, it is limited to take effect remains uncertain.³⁰

A future interest is vested when there is a person in being who would have a right, defeasible or indefeasible, to the immediate possession of the property, upon the ceasing of the intermediate or precedent interest.³¹

These sections appear to be unconstrued in Montana. But they have engendered a great deal of litigation in New York for the rather unforgivable reason that there are some future interests which satisfy both definitions.³²

b.

Secondly, the operation of our statutory rule against suspension of the absolute power of alienation is uncertain in a number of respects. In fact, the uncertainty is such that a seemingly common-place sort of transfer can raise a host of unsettled questions.

For example, suppose settlor S transfers income producing real and personal property upon *revocable* trust to pay income

²⁸In *re Sahlender's Estate*, 89 Cal. App. 2d 329, 201 P. 2d 69 (1948); *Dallapi v. Campbell*, 45 Cal. App. 2d 541, 114 P. 2d 646 (1941); see 6 American Law of Property § 25.61 (Whiteside ed., 1952). Contra, *Lockyear v. Tucker*, 69 Idaho 84, 203 P. 2d 380 (1949), (Apparently counsel and the court were relying on outmoded California authority.)

²⁹The California Constitutional provision seems innocuous enough at first blush. "No perpetuities shall be allowed except for eleemosynary purposes," A. XX § 9. But the California courts have seized upon it as evidencing an intention to adopt the common law rule. In *re Sahlender's Estate* supra note 28 201 P. 2d 69 at pages 73-79. The Montana Constitutional provision seems substantially identical, "No perpetuities shall be allowed, except for charitable purposes," A. XIX § 5.

³⁰Rev. Codes Mont. 1947 § 67-321.

³¹Id. § 67-322.

³²E.g., a transfer of realty to A for life, remainder to the heirs of A. It will be recalled that our statutes abolish the rule in *Shelley's* case, Rev. Codes Mont. 1947 § 67-520. See *Moore v. Littell*, 41 N.Y. 66 (1869); 6 American Law of Property § 25.32 (Whiteside ed., 1952).

to S for his life, and upon his death to pay income equally among S's children who survive S, and upon the death of each such surviving child to distribute a pro rata share of corpus per stirpes among such child's then-surviving issue, or, in default of such issue, per stirpes among the then-surviving issue of S's other children. This set of facts raises at least the following debatable issues.

(1)

When is this trust deemed to have been created for purposes of applying our statutory rule? (If at the time of the transfer, then our rule is violated because some portion of the trust might continue during the lives of after-born children of S,³² hence there is at least partial invalidity. If at S's death, when his power of revocation terminates,³³ then there can be no violation because any child of S can qualify as a life in being and the trust is certain to terminate upon the death of the survivor of S's children.) This question is frequently confused with a wholly different one, viz: whether the absolute power of alienation is suspended by a revocable trust. The answer to the latter question is clearly no.³⁴ But our statutory rule does *not* say that the absolute power of alienation may be suspended during lives in being at the date of the *suspension*. Rather, the statute permits suspension during lives in being at the date of the *transfer* creating the suspension.³⁵

Modern authority, applying the common law rule against perpetuities, treats such a transfer as taking place when the power of revocation terminates so that any lives in being at the latter date may be measuring lives.³⁷ On this analysis, as stated above,

³²The possibility of suspension beyond the permitted period as distinguished from the probability of it, is sufficient to cause invalidity. In *re Hartwig's Estate*, 119 Mont. 359, 365, 175 P. 2d 178 (1946).

³³Of course it could be terminated earlier by a release of the power.

³⁴*Equitable Trust Co. v. Pratt*, 117 Misc. 708, 193 N.Y. Supp. 152 (1922); *Irving Trust Co. v. Hartmann*, 8 N.Y.S. 2d 387 (Supreme Court, 1938); *Schenectady Trust Co. v. Emmons*, 261 App. Div. 154, 25 N.Y.S. 2d 230 (1941); *Bankers Trust Co. v. Topping*, 180 Misc. 596, 41 N.Y.S. 2d 736 (Supreme Court, 1943); *Chase Nat. Bank of City of New York v. Reed*, 189 Misc. 694, 67 N.Y.S. 2d 290 (Supreme Court, 1946); In *re Heller's Trust*, 115 N.Y.S. 2d 343 (Supreme Court, 1948) (dictum); *City Bank Farmers Trust Co. v. Cannon*, 291 N.Y. 125, 51 N.E. 2d 674 (1943) (dictum); Annot. 7 A.L.R. 2d 1089, 1094-96 (1949).

³⁵Rev. Codes Mont. 1947 § 67-406, quoted at pages 19-20, *supra*. It is easy to confuse these questions. For some judges and writers who have done so, see note 40, *infra*.

³⁷*Manufacturer's Life Ins. Co. v. Von Hamm-Young Co.*, 34 Hawaii 288 (1937); *Ryan v. Ward*, 192 Md. 342, 64 A. 2d 258, 7 A.L.R. 2d 1078 (1949); Gray, *The Rule Against Perpetuities* § 524.1 (4th ed., 1942); 6 *American Law of Property* § 24.59 (Leach and Tudor eds., 1952); 4 *Restatement, Property* § 373 (1944).

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our hypothetical trust would be valid. Moreover, such a result seems eminently sensible since, until the power of revocation terminates, there can be no substantial interference with alienability.

However, in Montana, as in New York and California,³⁸ the path to this appealing conclusion is barred, *prima facie*, by express statutory language. Our statute reads:

The delivery of the grant, where a limitation, condition, or future interest is created by grant, and the death of the testator, where it is created by will, is to be deemed the time of the creation of the limitation, condition, or interest, within the meaning of this part of the code.³⁹

A literal application of this statute, of course, leads to the conclusion that our hypothetical trust was created at the time of the original transfer. And, although judges and writers have occasionally made general statements to the contrary,⁴⁰ no case has been found which declines to comply with the statute. Indeed, the holdings in New York have kept scrupulously within it.⁴¹ There appears to be only one California case dealing with the question, and in that case the California Supreme Court applied the statute literally without even a suggestion of doubt.⁴²

³⁸Real Prop. L. (N. Y.) § 64, Pers. Prop. L. (N. Y.) § 11; Cal. Civ. Code (Deering, 1949) § 749.

³⁹Rev. Code Mont. 1947 § 67-422.

⁴⁰See *In re Heller's Trust*, 115 N.Y.S. 2d 343, 345 (Supreme Court, 1948) (dictum); Annot. 7 A.L.R. 2d 1089, 1091 (1949). Two of the editors of the American Law of Property appear to have been misled into a citation of New York cases in support of the modern doctrine under the common law rule. See 6 American Law of Property § 24.59, Case 92 and accompanying footnote 2 (Leach and Tudor eds., 1952). However, their co-editor has been careful to avoid this error in discussing the New York law. (Id. § 25.15 at pages 201, 202 and footnotes 9, 10 (Whiteside ed., 1952). And the distinction is noted in Gray, *The Rule Against Perpetuities* § 524.1, footnote 6 (4th ed., 1942).

⁴¹See cases cited in note 35, *supra*. The New York courts have, however, been astute to avoid their statutes. Thus, if a revocable trust instrument has been superceded by the substitution of a new instrument, it has been held in several cases that lives of persons born after the original creation of the trust, but prior to the date of substitution, are in being for purposes of the New York statutory rule because the date of substitution may be treated as the date of creation of the interests in question. *Schenectady Trust Co. v. Emmons*, 261 App. Div. 154, 25 N.Y.S. 2d 230 (1941); *Bankers Trust Co. v. Topping*, 180 Misc. 596, 41 N.Y.S. 2d 736 (Supreme Court, 1943); *Chase National Bank of City of New York v. Reed*, 189 Misc. 694, 67 N.Y.S. 2d 290 (Supreme Court, 1946).

⁴²*Sheean v. Michel*, 6 Cal. 2d 324, 57 P. 2d 127 (1936). The California legislature may have sought to repudiate this decision in the course of its 1951 perpetuities revision. Query, however, whether their statute is aptly worded for the purpose?

... The period of time during which an interest is destructi-

Admittedly, such a conclusion runs contrary to common sense. If the absolute power of alienation is not suspended until the power of revocation terminates, what reason is there for requiring a selection of measuring lives at an earlier date? Possibly for such reasons as this, the draftsmen of the Restatement of Property appear to suggest that the New York rule parallels the common law rule in this respect.⁴⁸ And of course it can be argued that the statute is but a codification of the common law and ought to be construed with equal flexibility.⁴⁹ At best, however, the Montana rule is in doubt.

(2)

Were it held that our trust was created, for perpetuities purposes, at the time of the original transfer, we would face another, and more complex, question, viz: how much of the transfer is invalid? (Although it is commonly said that any trust which suspends the absolute power of alienation beyond the permitted period is void,⁵⁰ it is well settled in New York and California that if the offending portion of a transfer can be excised without excessive distortion of the estate plan, the valid portions will be permitted to stand.⁵¹ A similar doctrine prevails under the common law rule.⁵²) Our general question of the degree of invalidity resolves itself into a number of specific inquiries, as follows:

(a)

Are the life interests in income which are given to S's children rendered inalienable by statute, so that the absolute power of alienation of each child's life interest is suspended during his lifetime? (If so, it is possible that a child of S who was born

ble pursuant to the uncontrolled volition and for the exclusive personal benefit of the person having such a power of destruction is not to be included *in determining the existence of a suspension of the absolute power of alienation* or the permissible period for the vesting of an interest within the rule against perpetuities. Cal. Stats. (1951) c. 1463 § 4, Cal. Civ. Code (Deering, 1949), 1953 Cum. Supp. § 716. (Italics supplied).

⁴⁸ Restatement, Property app., c. A, para. 14 (1944). Or it may be that the draftsmen simply did not note the effect of the New York statutes on this problem. If so, they are not alone. See note 40, *supra*.

⁴⁹ Though it is not altogether clear that the draftsmen of the Field Civil Code would agree. See Civil Code (N.Y., 1865), Intro., xxi through xxviii.

⁵⁰ 6 American Law of Property § 25.12 (Whiteside ed., 1952).

⁵¹ New York: Chaplin, Suspension of the Power of Alienation §§ 528-30 (3rd ed., 1928); 6 American Law of Property § 25.28 (Whiteside ed., 1952). California: Estate of Van Wyck, 185 Cal. 49, 196 Pac. 50 (1921); Otto v. Union Nat. Bank of Pasadena, 38 Cal. 2d 233, 238 P. 2d 961 (1951); 6 American Law of Property § 25.65 (Whiteside ed., 1952).

⁵² Restatement, Property, c. 28 Intro. Note, § 402 (1944).

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after the transfer might survive all persons in being at the time of the transfer, thus suspending the absolute power of alienation of his beneficial interest in the trust beyond lives in being at the date of the transfer.) The answer to this question depends upon whether our courts are willing to follow the New York construction of five of our code sections. The first two⁴⁸ limit the purposes for which express trusts of real property may be created to specified purposes, one of which is,

To receive the rents and profits of real property, and pay them to or apply them to the use of any person, whether ascertained at the time of the creation of the trust or not, for himself or for his family, during the life of such person, or for any shorter term, subject to the rules of sections 67-502 to 67-611;⁴⁹

The third section provides that,

The beneficiary of a trust for the receipt of the rents and profits of real property, or for the payment of an annuity out of such rents and profits, cannot transfer or in any manner dispose of his interest in such trust.⁵⁰

The fourth section provides,

Except as hereinafter otherwise provided, every express trust in real property, valid as such in its creation, vests the whole estate in the trustees, subject only to the execution of the trust. The beneficiaries take no estate or interest in the property, but may enforce the performance of the trust.⁵¹

And the fifth section provides,

Where a trust in relation to real property is expressed in the instrument creating the estate, every transfer or other act of the trustee, in contravention of the trust, is absolutely void.⁵²

In brief, the New York courts have analyzed their similar code sections as follows. Every trust falling within these sections is a spendthrift trust, the beneficiary being wholly without power to alien his interest; furthermore, the trustee is without power to join in a conveyance so as to terminate the trust. This being so, every trust falling within these sections suspends the absolute power of alienation, (unless someone possesses an unrestricted

⁴⁸Rev. Codes Mont. 1947 §§ 86-101, 86-105.

⁴⁹Id. § 86-105, 3.

⁵⁰Id. § 86-112.

⁵¹Id. § 86-108.

⁵²Id. § 86-114.

power to revoke or terminate it⁵³), and, if it may endure beyond the permitted period, it is void.⁵⁴ Our statutes, (as used to be the case in New York) appear in the Chapter of the codes which deals with trusts of *real* property. However, the New York courts applied their statutes, by analogy, to trusts of *personalty*.⁵⁵ Were the Montana courts to accept the New York analysis, it would follow that the beneficial interest of any afterborn child of S in our hypothetical trust would be void.⁵⁶ Were our courts to accept the analysis as to trusts of real property and reject it as to trusts of *personalty*, it would be necessary to face perplexing problems when mixed trusts of realty and *personalty* were involved.⁵⁷

⁵³Chaplin, Suspension of the Power of Alienation §§ 55-85 (3rd ed., 1928), and see cases cited in note 35, *supra*.

⁵⁴See discussion in 2 Simes, Future Interests § 568 (1936).

⁵⁵Stringer v. Young, 191 N.Y. 157, 83 N.E. 690 (1908); Cochran v. Schell, 140 N.Y. 516, 534, 35 N.E. 971 (1894); 6 American Law of Property § 25.14 (Whiteside ed., 1952).

⁵⁶A good deal of confusion is interjected, at this point, by the case of *In re Murphy's Estate*, 99 Mont. 114, 43 P. 2d 233 (1935). In the *Murphy* case, it was held that a residuary trust to pay income to grandchildren until they should respectively attain the age of 21 did not unlawfully suspend the absolute power of alienation. As noted above, (note 15, *supra*) the court's result can be justified on the ground that the case fell within the limited exception of § 67-513 of the codes, permitting suspension for lives in being plus the actual minority of a beneficiary. But the court did not take this position. Rather, the opinion states that there was no suspension during the minorities of the grandchildren following the death of their parent, because, after that event, the class of grandchildren could not increase so that each grandchild took a definite interest, which the court assumed to be alienable. 99 Mont. 114, 123-27. Despite the cases involving this estate which reached the Montana Supreme Court (*In re Estate of Murphy*, 57 Mont. 273, 188 Pac. 146 (1919); *In re Murphy's Estate*, 99 Mont. 73, 43 P. 2d 230 (1935), in addition to the principal case) it is not clear whether the corpus of the trust consisted entirely of *personalty* or of both realty and *personalty*. To the extent that real estate was involved, the Supreme Court's opinion must be regarded as suspect because of the code sections which were not discussed therein. To the extent that *personalty* was involved, the court may have repudiated the New York rule previously mentioned. However, one cannot be sure of this. The New York decision upon which the Montana court relied, *Tucker v. Bishop*, 16 N.Y. 402 (1857), was treated by the New York court as one involving an outright gift of a legacy, payable in the future, rather than a trust to pay income to beneficiaries until they attained a named age and then to distribute corpus. It is clear that this latter sort of gift does not, of itself, suspend the absolute power of alienation, 6 American Law of Property § 25.10 (Whiteside ed., 1952). Hence it would appear that the whole question of suspension by statutory spendthrift trusts remains highly controversial in this State.

⁵⁷E.g., assuming a mixed trust of realty and *personalty*, does the invalidity of the trust as to the real estate require the invalidation of the entire trust, or may it be held valid as to one type of asset and invalid as to the other? Michigan and Minnesota cases have generally taken the position that the entire trust is thereby rendered void. *Rong v. Haller*, 109 Minn. 191, 123 N.W. 471 (1909); *In re Richards' Estate*, 283 Mich. 485, 278 N.W. 657 (1938). Though one Michigan case suggested that a

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It seems likely that the Montana courts will follow New York, at least as to real property trusts, likely but not certain. After all, it seems somewhat incongruous that our statutes should both suspend the absolute power of alienation of a trust beneficiary's interest and simultaneously declare that such suspension renders the trust for his benefit void.⁵⁸

(b)

Assuming that the trust would be void as to any after-born child of S in accordance with the New York doctrines just discussed, does this defect merely invalidate the trust as to such after-born children, or is the entire trust void? In order to avoid complete invalidity, it is necessary to deal with the theoretically distinct issues of separability and distortion.

At its extremes, the separability issue hinges upon the settlor's intentions at the date of transfer. He could, if he wished, create a single trust for several beneficiaries. Or he could, if he wished, transfer property to a trustee and create several trusts by the same indenture, the corpus of each consisting of an undivided interest in the property so transferred.⁵⁹ Logically, no event subsequent to the date of transfer, including questions of invalidity arising subsequently, is relevant to this issue.

Conventionally, the issue of distortion is posterior to that of separability, and arises only if separate trusts, some valid and some invalid, are found to exist. In such cases, the inquiry is, in the light of the settlor's general plan of disposition, as evidenced by the instrument of transfer, *and* in the light of the determination that some valid and some invalid trusts have been created, would the settlor prefer that the valid trusts be upheld, or that the entire transfer be invalidated?⁶⁰

(1)

Turning first to the issue of separability, it is obvious that, in close cases, construction will be all-important. And at this point we encounter a local anomaly which renders the Montana law of separability highly unpredictable. The New York cases go well beyond unbiased construction in seeking to hold trusts

severance might be possible if the real estate constituted a very minor part of the trust res. *Dodge v. Detroit Trust Co.*, 300 Mich. 575, 2 N.W. 2d 509, 518 (1942). See 6 American Law of Property §§ 25.37, 25.49 (Whiteside ed., 1952).

⁵⁸See 2 Simes, *Future Interests* § 568, p. 462 (1936).

⁵⁹In *re* Mount's Will, 185 N.Y. 162, 77 N.E. 999, 1001 (1906).

⁶⁰In *re* Micheletti's Estate, 24 Cal. 2d 904, 151 P. 2d 833 (1944); In *re* Lyons' Will, 271 N.Y. 204, 2 N.E. 2d 628 (1936); In *re* Mount's Will, 185 N.Y. 162, 77 N.E. 999 (1906); 4 Restatement, Property § 402 (1944); 2 Simes, *Future Interests* § 529 (1936).

separable for perpetuities purposes.⁶¹ In the language of Justice Cardozo, "The court struggles to preserve, and surrenders to nothing short of obvious compulsion."⁶² Indeed, it can be argued that the New York courts are approaching the position that trusts may be held separable unless separation would be fruitless because elimination of the invalid trusts would so distort the settlor's plan of disposition as to require a holding that the valid trusts must fall with them.⁶³ At the least, it is entirely clear that the New York courts will not surrender to anything so unsubstantial as the manifest intention of a settlor to create what, as a matter of form, is a single trust for several beneficiaries rather than several trusts. There are a number of New York cases in which such trusts have been held separable.⁶⁴

Unfortunately, it is not at all clear that our Supreme Court will accept these New York cases. As of this writing, the pre-

⁶¹See 6 American Law of Property §§ 25.24-28 (Whiteside ed., 1952) and cases cited.

⁶²In re Gallien, 247 N.Y. 195, 160 N.E. 8, 9 (1928).

⁶³"The will does not expressly provide that upon the death of the husband the trust shall be divided into separate shares, but a direction to do so will be implied from the direction to divide the income between the daughters, and from the direction that on the death of a daughter leaving issue the principal from which that daughter received income shall be paid to her issue." In re Halsey's Will, 286 N.Y. 154, 36 N.E. 2d 91, 93 (1941). Is it not quite clear that the tests of separability accepted by the New York court in this case impose virtually no limitations upon separability? And see In re Horner's Will, 237 N.Y. 489, 143 N.E. 655 (1924). In Horner, Justice Cardozo found trusts for the children of testator's son, created in paragraph Tenth of the will to be separable and valid, while a trust for the benefit of children of testator's daughter, created in paragraph Ninth was held to be invalid. The obvious difference between the provisions for these two classes of grandchildren was that the children of the son who were to benefit were all persons in being, while the trust for the children of the daughter might have benefited after-borns. Yet the language of paragraphs Ninth and Tenth were otherwise virtually indistinguishable, and Justice Cardozo had before him a prior New York case, In re Mount's Will, 185 N.Y. 162, 77 N.E. 999 (1906), in which a trust for children of a nephew, including after-borns, was found to be separable and valid as to those in being at the testatrix' death. Justice Cardozo distinguished the Mount case on a technical ground, (the absence of an express direction for division of corpus into shares in Horner, 143 N.E. 655, 659-60); but the same defect did not prevent his Honor from upholding the trust for the children of testator's son under paragraph Tenth, 143 N.E. 655, 656-58. Justice Cardozo's discussion of the trust for children of the daughter under paragraph Ninth shows exclusive preoccupation with the question of whether the provisions for the child in being could be upheld without undue distortion of testator's plan of disposition. Since the living child was very young, there was a real possibility of after-borns, and it was concluded that undue distortion might result. 143 N.E. 655, 658-60.

⁶⁴A number of such are discussed in 6 American Law of Property §§ 25.24-28 (Whiteside ed., 1952).

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ponderant (and most recent) local authority endorses Professor Gray's Spartan statement on construction,

"The Rule against Perpetuities is not a rule of construction, but a peremptory command of law. It is not, like a rule of construction, a test, more or less artificial, to determine intention. Its object is to defeat intention. Therefore every provision in a will or settlement is to be construed as if the Rule did not exist, and then to the provision so construed the Rule is to be remorselessly applied."⁶⁵

Nor is much comfort to be found in Gray's acknowledgment, in a passage following that above-quoted, that a preference for a valid construction may be indulged if the instrument in question is, "... really ambiguous, and is fairly capable of two constructions . . ."⁶⁶ We have already observed that a number of the New York cases find separable trusts despite the literal form of the instrument. Unless our Supreme Court will go further than Gray's treatise, it is unlikely to approve these New York cases, and, a fortiori, is unlikely to find separable trusts in the hypothetical case which we are considering.

Of course, our Court might go further. There is some local authority for a more liberal view.⁶⁷ And it can be argued, with much force, that Gray's rule is inappropriate in Montana, it having been formulated to apply to the common law rule against perpetuities, which is conspicuously less restrictive than our statutory rule. Furthermore, there is much dissent from Gray's statement even under the common law rule.⁶⁸ And while it is true that the liberal New York cases have arisen under a statutory rule even more restrictive than ours,⁶⁹ our Court has recog-

⁶⁵Gray, *The Rule Against Perpetuities* § 629 (4th ed., 1942). See *In re Swayze's Estate*, 120 Mont. 546, 550, 191 P. 2d 322 (1948); *In re Murphy's Estate*, 99 Mont. 114, 124, 43 P. 2d 233 (1935). And in the one case in which our Supreme Court appeared receptive to a slightly less rigorous rule, the Court nonetheless found it impossible to save the transfer by construction. *In re Hartwig's Estate*, 119 Mont. 359, 365-66, 175 P. 2d 178 (1946).

⁶⁶Gray, *op. cit. supra* § 633.

⁶⁷Though it certainly is not very persuasive, *In re Hartwig's Estate*, *op. cit. supra*, and can be reconciled with Gray's rule. Gray, *op. cit. supra* § 633.

⁶⁸2 Simes, *Future Interests* § 550 (1936); 4 *Restatement, Property* § 375 (1944); 6 *American Law of Property* § 24.45 (Leach and Tudor eds., 1952) and cases cited.

⁶⁹Suspension being generally limited to two lives in being, *Real Prop. L.* § 42, *Pers. Prop. L.* § 11.

nized that New York cases are persuasive authority in construing our statutes.⁷⁰

Let us now turn directly to our hypothetical case: Are the income interests given to each of S's children who survive him separable, or does the fact that after-born children may be included require a holding that the interests of all children are invalid?

The nature of the case against separability has already been indicated. We must view the transaction from the creation of the trust, ignore later events, and follow the literal language of the instrument, without a preference for validity. When we do, we are faced with the fact that there is no literal separation of the transfer into separate trusts. Initially, S reserves a right to income from the entire corpus for his life. Then he directs that, at his death, the income be distributed equally among his then-surviving children. There is nothing to suggest a division of the corpus at all prior to the death of a child. S not having intended to create separate trusts, he didn't. Hence no separability.

The case for separability is as follows. Admittedly, there is no separation until S's death. But a number of New York cases hold that a separation is effected upon the death of a life tenant by language directing, at most, a purely verbal separation of the corpus into shares at that time, (no separation for purposes of administration is required.)⁷¹

In our hypothetical case, income is to be distributed equally among S's surviving children, and at the death of each child a pro rata share of corpus is to be released from the trust. Is this not a sufficient compliance with the requirement of separation into shares upon S's death? There is a decision of the New York Court of Appeals which is squarely in point on this issue. It says yes.⁷² The New York courts have been interpreting statutes analogous to ours for over 100 years. We ought to be guided by

⁷⁰In *re* Murphy's Estate, 99 Mont. 114, 124-25, 43 P. 2d 233 (1935). It can be argued, of course, that our statutory rule more closely parallels that of California prior to the 1951 amendments in that state, Cal. Civ. Code (Deering, 1949) §§ 715, 716, and that the California courts, while favoring a valid construction, were less enthusiastic in that direction than New York. See 6 American Law of Property § 25.64 (Whiteside ed., 1952) and cases cited. But at least a partial answer is that the California legislature thought their rule, thus applied, to be too restrictive, for the California statutes were liberalized further by amendment in 1951. Cal. Stats. (1951) c. 1463.

⁷¹In *re* Halsey's Will, 286 N.Y. 154, 36 N.E. 2d 91 (1941); In *re* Buttner's Will, 243 N.Y. 1, 152 N.E. 447 (1926); In *re* Horner's Will, 237 N. Y. 489, 143 N.E. 655 (1924); *Schenectady Trust Co. v. Emmons*, 261 App. Div. 154, 25 N.Y.S. 2d 230 (1941).

⁷²In *re* Halsey's Will, 286 N.Y. 154, 36 N.E. 2d 91 (1941).

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their experience. Hence the trusts for each of S's surviving children are separable.

Which of these two analyses the Montana Supreme Court would accept is, unfortunately, very uncertain indeed. In order to reach the issue of distortion, however, we will assume that separable trusts are found to have been created.

(2)

Turning now to the question of distortion, since the income interests given after-born children are invalid, would the desires of S be better served by upholding the income interests of children who were in being at the creation of the trust, or by invalidating all, so as to treat all children equally? If the former, it is well settled that the valid income interests may stand; otherwise not.⁷³ In fact, since the trust is revocable, this issue would probably arise after S's death.⁷⁴ At this time, it will be known whether or not he had after-born children who survived him. If he did, and if the result of invalidating the interests of all children would be to permit them to take equally under S's will or by intestacy, it would probably be held that the valid income interests failed with the invalid ones.⁷⁵ But suppose that, in fact, S had no surviving children born after the creation of the trust. Were this the case, it would seem entirely clear that S would prefer the valid income interests in his children who were in being when the trust was created to stand. However, it is *not* clear that we may consider facts occurring subsequent to the creation of the trust in deciding this question. If we accept the language of the cases, probably we cannot,⁷⁶ leading to the ridiculous conclusion

⁷³Estate of Maltman, 195 Cal. 643, 234 Pac. 898 (1925); 4 Restatement, Property, app. c. A, para. 70, § 402 (1944).

⁷⁴Though it could arise earlier if S's creditors sought to attack the trust. See Sheean v. Michel, 6 Cal. 2d 324, 57 P. 2d 127 (1936).

⁷⁵Benedict v. Webb, 98 N.Y. 460 (1885); 4 Restatement, Property § 402, Comment a., Illustration 3 (1944).

⁷⁶In re Horner's Will, 237 N.Y. 489, 143 N.E. 655, 659 (1924); In re Mount's Will, 185 N.Y. 162, 77 N.E. 999, 1001 (1906); Otto v. Union Nat. Bank of Pasadena, 38 Cal. 2d 233, 238 P. 2d 961, 964 (1951). Though the draftsmen of the Restatement are vague on this point. 4 Restatement, Property § 402, Comment a (1944). This question must be distinguished from that of whether facts occurring subsequent to the creation of an interest may be considered for purposes of deciding whether the interest itself violates our statutory rule. The answer to the latter question is clearly no. In re Hartwig's Estate, 119 Mont. 359, 365, 175 P. 2d 178 (1946); 6 American Law of Property § 25.15 (Whiteside ed., 1952). The question we are considering is whether an interest which does not violate our statutory rule should be invalidated because associated interests are admittedly invalid and permitting the valid interest to stand may distort the settlor's plan of disposition. Clearly a consideration of the facts existing when the issue of distortion arises will assist in disposing of it.

that S would have preferred that the income interests of children who were in being at the creation of the trust be invalidated in order to treat them in the same way as his after-born children who do not in fact exist. But if we look to the results of the cases, perhaps we can.⁷⁷ Hence let us assume that S had no after-born children who survived him and that the Montana Supreme Court will uphold the income interests of children in being at the creation of the trust. Our remaining question as to the extent of invalidity concerns the remainder⁷⁸ interests in corpus, limited to the surviving issue of S's children.

(3)

The validity of the remainder interests is controlled by our statutes which declare any future interest void in its creation if it may suspend the absolute power of alienation beyond lives in being.⁷⁹ And, viewing the situation as of the creation of the trust, an interest in remainder might vest in the surviving issue of an after-born child of S subsequent to the termination of lives in being at the creation of the trust. Thus, the interests limited to such issue are clearly invalid. Whether this invalidity extends to all remainder interests depends upon the doctrines of separability and distortion previously discussed in connection with the income interests of S's children.

As to separability, conceding that a gift to a single class of beneficiaries is entirely invalid if any of the members of the class might take in violation of our statutory rule,⁸⁰ there may be an

⁷⁷Cf. *In re Horner's Will*, op. cit. supra, and *In re Mount's Will*, op. cit. supra. In both cases, the New York Court of Appeals states that facts occurring subsequent to the creation of the interests are irrelevant to the issue of distortion. But in the Mount case, a trust for children of a nephew, including after-borns, was found separable and valid as to children in being at testatrix' death, and the court made much of the extreme unlikelyhood that the nephew would in fact have after-born children. 77 N.E. 999, 1001. While in the Horner case, which reached the opposite result, there was evidently a real possibility of after-borns. 143 N.E. 655, 658-59.

⁷⁸By common law classification, the gifts over to the then-surviving issue of S's other children upon the death of a child of S without issue are executory interests. 2 Simes, *Future Interests* § 149 (1936). But under our statutory definitions, they are remainders or conditional limitations. Rev. Codes Mont. 1947 § 67-519.

⁷⁹Rev. Codes Mont. 1947 §§ 67-406, 67-407, set forth at pages 19-20 supra.

⁸⁰The only decision to this effect which has been found is the Oklahoma case of *McLaughlin v. Yingling*, 90 Okla. 159, 213 Pac. 552, 561-64 (1923), and the Oklahoma court was of the opinion that the local statute against suspension of the absolute power of alienation was declaratory of the common law rule against perpetuities. This rule is well settled at common law however. 2 Simes, *Future Interests* §§ 527-28 (1936) and cases cited. And it is well settled in New York that a gift to a class which may include after-borns suspends the absolute power of alienation. 6 American Law of Property § 25.8, and cases cited in note 9 (Whiteside ed., 1952).

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invalid gift to one class of remaindermen and a valid gift to another distinct class.⁸¹ Here, we have separate classes of remaindermen, consisting of the issue of each surviving child of S. Clearly, the remainder interests limited to the issue of any child of S who was in being at the creation of the trust cannot suspend the absolute power of alienation beyond lives in being because they will become possessory, if at all, at the termination of a life in being at the creation of the trust.⁸² Hence the remainders to these classes are separable and valid;⁸³ only those limited to the issue of after-born children are void.⁸⁴

In view of this partial invalidity, would the plan of S be better served by upholding the valid interests in corpus, or by invalidating the whole? The New York cases seem to favor partial validity, even where the distributions to grandchildren of the creator of the trust may thereby be rendered unequal.⁸⁵ To get on, let us assume that the Montana Court would so hold.

Final questions of separability and distortion are presented by the gifts over upon the death of any child of S without issue to the then-surviving issue of S's other children. While no New York or California case precisely in point has been found, an argument can be made for separability, as follows. Admittedly, a gift over upon the death of any after-born child of S is void because it might occur too remotely.⁸⁶ However, a gift over upon the death of any child of S in being at the creation of the trust must vest in possession, if at all, within the permitted period, though the gift over might be shared by a single class (consisting of the then-surviving issue of all of S's children) which would include the issue of after-born children. And, since each gift over is of a separable share of corpus, it should follow that the valid may be separated from the invalid. Lastly, in view of the decisions mentioned in the preceding paragraph, it would seem that the valid gifts over would be permitted to stand, on the basis that such could be done without undue derangement of S's plan of disposition.

⁸¹2 Simes, *op. cit. supra* at page 404; 6 American Law of Property § 24.29 (Leach & Tudor eds., 1952). The problem of finding sub-classes in our hypothetical situation is simpler than in the case posed by Messrs. Leach and Tudor in their discussion, since we are assuming a determination that the children of S each took as the beneficiary of a separate trust, rather than as a class.

⁸²I.e., the life of their parent (or aunt or uncle), S's child.

⁸³See the treatises listed in note 80, *supra*, and cases cited therein.

⁸⁴*Ibid.*

⁸⁵*In re Horner's Will*, 237 N.Y. 489, 143 N.E. 655 (1924); *In re Lyons' Will*, 271 N.Y. 204, 2 N.E. 2d 628 (1936).

⁸⁶*In re Heard's Estate*, 25 Cal. 2d 322, 153 P. 2d 553 (1944).

c.

In Conclusion

A number of pages ago, it will be recalled, we undertook to illustrate the unsettled state of the Montana law of perpetuities. We have just finished discussing the second such illustration, and therewith the plaintiff rests.

3.

Unique Law

It was observed at the outset⁸⁷ that Montana can be classified as one of a number of states which have copied the New York statutory rule against perpetuities. As a matter of genesis, this is true. But insofar as the statement implies that decisions from a number of other states offer a ready supply of authoritative interpretations of our statutes, it is most misleading. In fact, decisions on the same facts vary a good deal from state to state, for the excellent reason that the statutes themselves vary. Indeed, the statutes not only vary between states, they have been amended from time to time in practically every state in which they have been adopted. Hence, any perpetuities case from another state which is cited in the Montana courts must be regarded as suspect until the statutes of that state have been examined, (and they are not always quoted in the opinions.) Furthermore, because of the periodic amendments, it may be necessary to consult something more than current statutes. It is probably a safe statement that there is no law library in Montana, other than that of the Law School, which is adequate for such research. Even the Law School Library is not entirely so.

In addition, two other limitations on the utility of decisions from these other states should be mentioned. First, there are very few decisions from some of them. Secondly, judicial construction of the statutes has varied a good deal from state to state, and, particularly in the case of New York, local construction has also varied a great deal.

These points merit some illustration, though a comprehensive discussion is impracticable. The other states to which we might look for aid in construing our statutes, (because they have—or had—some sort of prohibition against suspension of the absolute power of alienation) are the following: Arizona; California; Idaho; Indiana; Kentucky; Michigan; Minnesota; New York; North Dakota; South Dakota; Oklahoma, and; Wisconsin.⁸⁸

⁸⁷Page 20 *supra*.

⁸⁸4 Restatement, Property, app. c. B, t. 1, Para. 1 (1944).

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Some of these states can be eliminated at the outset. Arizona, Idaho, and the Dakotas have too few decisions, and the statutes of all but South Dakota differ from ours in important respects.⁸⁰ Indeed, a recent North Dakota amendment has adopted the common law permitted period of lives in being and 21 years.⁸¹ Kentucky has a single statute permitting suspension of the absolute power of alienation for lives in being and 21 years and 10 months, which appears to have been construed as declaratory of the common law rule.⁸² Oklahoma can also be eliminated. The Oklahoma statutes have varied materially from Montana's since 1919,⁸³ while the Oklahoma case law is quite confusing,⁸⁴ some cases treating the statutes as declaratory of the common law rule against perpetuities.⁸⁵

Michigan and Indiana will be of no help in the future; both states have repealed their statutes against suspension, (Indiana in 1945, Michigan in 1949) and returned to the common law rule against perpetuities.⁸⁶ The Indiana cases arising under the earlier statutes might be quite helpful, however. They were borrowed from New York in 1843,⁸⁷ but the generally permitted period of suspension was lives in being as in Montana.⁸⁸ The Michigan suspension statutes, on the other hand, varied markedly from ours. They were adopted in 1846, the generally permitted period being two lives in being.⁸⁹ However, the Michigan statutes applied only

⁸⁰See 6 American Law of Property §§ 25.58, 25.67, 25.74-76, 25.82. (Whiteside ed., 1952).

⁸¹Laws of North Dakota (1953) ch. 274. It may be noted in passing that this statute contains a rather glaring defect. Literally, it permits suspension of the absolute power of alienation for lives in being and 21 years, "Except in the single case mentioned in section 47-0413, . . ." N.D. Rev. Code of 1943 § 47-0413 is identical, (one comma excepted) to Rev. Codes Mont. 1947 § 67-513, quoted in note 15 supra, and, in some situations, permits such suspension for lives in being and an actual minority. The reconciliation of these statutes is somewhat difficult to say the least.

⁸²See 6 American Law of Property § 25.87 (Whiteside ed., 1952).

⁸³In that year, a statute was enacted permitting trusts of real or personal property to endure for lives in being or 21 years. Okla. Laws (1919) c. 16 § 2. In 1941, the Oklahoma legislature further amended their statutes to permit suspension by a trust during lives in being and 21 years. Okla. Stat. Anno. t. 60 § 175.47.

⁸⁴See Browder, Perpetuities in Oklahoma, 6 Okla. L. Rev. 1 (1953).

⁸⁵E.g., *McLaughlin v. Yingling*, 90 Okla. 159, 213 Pac. 552 (1923); *Walker's Estate*, 179 Okla. 442, 66 P. 2d 88 (1937). These cases, and others, are discussed in Browder, *op. cit. supra*, at 7-18, 20-24.

⁸⁶Ind. Acts (1945) c. 216; Mich. Laws (1949) Act 38.

⁸⁷6 American Law of Property § 25.69 (Whiteside ed., 1952).

⁸⁸*Ibid.*

⁸⁹Mich. Rev. Stat. (1846) c. 62 §§ 14-21, 23.

to real property and chattels real.⁹⁹ The common law rule remained in force as to chattels personal.¹⁰⁰

The statutes of the remaining states merit individual attention. A few of the more conspicuous differences between these statutes and our own are noted below, together with some comments on interpretation.

a.

California

Our statutes were originally borrowed from California in 1895,¹⁰¹ hence we might expect to make good use of California case law. However, 1951 amendments to the California statutes have substantially altered the law of perpetuities in that state.¹⁰² The old sections on the permitted period of suspension were repealed,¹⁰³ and a new section was enacted to permit suspension during lives in being and 21 years.¹⁰⁴ Another new section adopts the common law rule.¹⁰⁵ Hence future California decisions will be based upon statutes which vary markedly from our own. Furthermore, prior to 1951, the California statutes had been altered a good deal. In 1874, the statute which provides that any trust to apply the rents and profits of land is a spendthrift trust was amended; since that date, the statute has merely permitted the draftsman to include spendthrift provisions.¹⁰⁶ In 1917, the generally permissible period was altered from lives in being to lives in being or 25 years.¹⁰⁷ Hence even the old California cases are not necessarily applicable.

b.

Minnesota

The generally permitted period of suspension is two lives in being,¹⁰⁸ and the statutes apply only to transfers of real property

⁹⁹Ibid.

¹⁰⁰Michigan Trust Co. v. Baker, 226 Mich. 72, 196 N.W. 976 (1924).

¹⁰¹Civ. Code (Mont.) 1895 §§ 1115, 1116, 1150, 1151, 1191, 1219-26, 1310, 1314, 1321, 1323.

¹⁰²Cal. Stats. (1951) c. 1463. For a discussion of these statutes, see Fraser and Sammis, *The California Rules Against Restraints on Alienation, Suspension of the Absolute Power of Alienation, and Perpetuities*, 4 Hastings L. J. 101 (1953).

¹⁰³Id. § 7.

¹⁰⁴Id. § 1.

¹⁰⁵Id. § 2.

¹⁰⁶Cal. Civ. Code (Deering, 1949) § 867; 6 American Law of Property § 25.62 (Whiteside ed., 1952). This seemingly innocuous distinction has sufficed to render the California law on suspension by an indestructible trust somewhat uncertain. See *Otto v. Union Nat. Bank of Pasadena*, 38 Cal. 2d 233, 238 P. 2d 961 (1951), noted in 41 Calif. L. Rev. 549 (1953).

¹⁰⁷Cal. Civ. Code (Deering, 1949) § 715; 6 American Law of Property, op. cit. supra, § 25.59.

¹⁰⁸Minn. Stats. (1953) § 500.13.

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and chattels real, the common law rule being in force with respect to chattels personal.¹⁰⁹ Furthermore, the Minnesota courts have held, contrary to our statute,¹¹⁰ that a power to sell trust property and reinvest the proceeds prevents suspension of the absolute power of alienation.¹¹¹

c.

New York

The generally permitted period of suspension is two lives in being,¹¹² and this difference, while it would appear to be comprehensible enough, has a tendency to cause trouble.¹¹³ New York now has an express provision rendering beneficial interests in trusts of personalty inalienable.¹¹⁴ The New York decisions run the gambit from a most rigorous enforcement of their statutes, (immediately after their enactment in 1830¹¹⁵) to the current very lenient construction of challenged transfers.¹¹⁶ We have already observed that the Montana cases are out of line with current New York tenets of construction.¹¹⁷

d.

Wisconsin

The generally permitted period of suspension was originally two lives in being,¹¹⁸ later modified to two lives in being and 21 years,¹¹⁹ later modified to lives in being and 30 years.¹²⁰ At the date of the last amendment, 1927, the statute was broadened to cover personalty as well as realty.¹²¹ Thus the permitted period in Wisconsin is longer than in any other state.

It will thus be seen that the job of deciding whether decisions from other jurisdictions are applicable in Montana is no

¹⁰⁹In *re* Tower's Estate, 49 Minn. 371, 52 N.W. 27 (1892).

¹¹⁰Rev. Codes Mont. 1947 § 67-512. But cf. *Hodgkins v. Northland Petroleum Consolidated*, 104 Mont. 328, 339, 67 P. 2d 811 (1937).

¹¹¹*Atwood v. Holmes*, 224 Minn. 157, 28 N.W. 2d 188 (1947).

¹¹²Real Prop. L. (N.Y.) § 42; Pers. Prop. L. (N.Y.) § 11.

¹¹³A great many of the New York cases involve trusts for the benefit of more than two ascertained persons, and any such trust would, of course, be valid under our statutes. Further, one can never be quite sure whether New York liberal construction, designed to avoid invalidity under the two-lives rule, is applicable where after-borns are involved. See, e.g., *In re Horner's Will*, 237 N.Y. 489, 143 N.E. 655 (1924), discussed in note 63 *supra*.

¹¹⁴Pers. Prop. L. (N.Y.) § 15.

¹¹⁵*Coster v. Lorillard*, 14 Wend. 265 (N.Y., 1835); *Hawley v. James*, 16 Wend. 61 (N.Y., 1836).

¹¹⁶See discussion at pages 29-30 *supra*, and cases cited.

¹¹⁷Pages 30-31 *supra*.

¹¹⁸6 American Law of Property § 25.57 (Whiteside ed., 1952).

¹¹⁹*Ibid*.

¹²⁰The current provision. Wis. Stats. (1953) § 230.15.

¹²¹Wis. Stats. (1925) c. 4. The current provision appears in Wis. Stats. (1953) § 230.14.

mean task, and that the outlook for the future is no brighter. The current trend in the states which have some version of the New York statutory rule is toward its abolition in favor of the common law rule against perpetuities,¹²² or drastic amendments which look in the same direction.¹²³

Finally, it should be observed that the various treatises do not offer much assistance. They contain only limited discussions of Montana law,¹²⁴ if they discuss it at all,¹²⁵ and are prone to such statements as the following:

"The statutes of Arizona, California, Idaho, Indiana, Kentucky, Montana, North and South Dakota, and Oklahoma, all deal—in some sense—with 'suspension of the absolute power of alienation,' . . . This book deals with the law of New York, but many of the principles discussed have a bearing, and many of the New York cases cited are of value, under the laws of all the States mentioned, . . ."¹²⁶

"Thus, the *general outlines* of the statutory rule against suspension of the power of alienation, as indicated in the decisions discussed above, follow closely the California interpretation except that Montana does not permit the use of a period in gross. It may be assumed that the California and New York decisions will be *influential* in the future development of the rule in Montana."¹²⁷ (Italics supplied.)

e.

In Conclusion

Of course, the foregoing does not mean that our law of perpetuities is unique in the absolute sense; decisions from these other states can furnish invaluable assistance in construing our statutes. But it is clear that our statutes are unique enough to make the search for this assistance a tricky business, impracticable without an extensive library. And it is also clear that this uniqueness is magnified by the lack of a comprehensive textual statement of *our* statutory rule.¹²⁸ Many, many hours must be spent to achieve

¹²²Ind. Acts (1945) c. 216; Mich. Laws (1949) Act 38.

¹²³Cal. Stats. (1951) c. 1463; Laws N.D. (1953) c. 274.

¹²⁴4 Restatement, Property, app. c. B, para. 62 (1944); 6 American Law of Property § 25.73 (Whiteside ed., 1952).

¹²⁵Chaplin, Suspension of the Power of Alienation, (3rd ed., 1928), apparently the most recent treatise devoted wholly to the statutory system, does not.

¹²⁶Id. § 26.

¹²⁷6 American Law of Property, op. cit. supra, § 25.73.

¹²⁸There are several extensive discussions of the New York system. 4 Restatement, Property, app. c. A (1944); 6 American Law of Property, op. cit. supra, Part 25, Subpart I, c. 2-5; Chaplin, op. cit. supra.

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orientation. Yet, if they are not spent, grave errors are a moral certainty.

4.

Summary

The case against our statutory rule against perpetuities can be stated very simply. We have only a little local law, leaving many unsettled questions, and it is difficult to find the answers in treatises, or in decisions from other states. Furthermore, the situation is unlikely to improve. Current legislation elsewhere is rendering our statutes more and more unique. Research under our statutory rule is, increasingly, an inquiry into the outmoded law of other jurisdictions. And a sufficient increase in local litigation to make recourse to foreign law unnecessary is not in prospect. It is for these reasons that Montana practitioners who seek a working knowledge of our law of perpetuities are entitled to our sympathy.

II.

And What Can Be Done About It?

The remedy is certainly not obscure. Our statutory perpetuities system ought to be discarded if a more workable substitute can be found. And it seems clear that there is a more workable substitute, viz: the common law rule against perpetuities.

A.

Advantages of the Common Law Rule

If the common law rule were adopted in Montana, we would only lose the benefit of a handful of local decisions, while we would gain a system that is in force, without substantial statutory modification, in nearly three-fourths of the United States.¹²⁹ This means that an ample supply of case law from other jurisdictions would be available to the Montana practitioner. Furthermore, he would have ready access to the law, for there are a number of excellent treatises which deal exhaustively with the common law rule,¹³⁰ plus a much larger number of articles in the legal journals.

¹²⁹32 such states are listed in 4 Restatement, Property, Part I., Intro. Note at 2133-35. To this list should be added Indiana and Michigan which have since enacted statutes restoring the common law rule. But Pennsylvania and Massachusetts must be subtracted, for they have undertaken substantial statutory modification of the common law rule. The Pennsylvania statutes, enacted in 1947, are Pa. Stat. Ann. (Purdon, perm. ed.) t. 20 §§ 301.4, 301.5. See Comment, 48 Mich. L. Rev. 1158, 1166 et. seq. (1950). The Massachusetts statutes, enacted in 1954, are 6 Ann. L. Mass. c. 184A.

¹³⁰Gray, *The Rule Against Perpetuities* (4th ed., 1942); 4 Restatement, Property, Part I (1944); 2 Simes, *Future Interests*, c. 30, 31 (1936); 6 *American Law of Property*, Part 24 (Leach and Tudor eds., 1952).

It can be argued, of course, that there is not the uniformity in decisions applying the common law rule which the foregoing implies. It is true that there is some diversity in the cases, but certainly less in this area of the common law than in most others. Further, it is much easier to cope with a unique decision from another state than with unique local statutes, the literal language of which is backed by constitutional premises regarding separation of powers.

Another advantage of the common law rule is that it is less restrictive, and hence easier to work with, than our statutes. For example, the hypothetical case with which we struggled, from pages 23 to 35 of this discussion would be perfectly valid under the common law rule.¹⁸¹

This is not to say, of course, that the common law rule is without its critics. There are some articles in the current literature which are most critical of it.¹⁸² But the burden of these articles is that the common law rule is needlessly restrictive, and our statutory rule is still more so. Indeed, the principal antagonist of the common law rule, Professor Leach of Harvard Law School, is even more vehemently opposed to the New York statutory system.¹⁸³ Finally, the critics of the common law rule nonetheless accept it as the basis for the perpetuities systems which they propose. No one is suggesting that the ideal can be created with our statutory system as a model.¹⁸⁴

B.

Mechanics

Two questions remain. Which of our statutes should be repealed? And how does one go about adopting the common law rule against perpetuities?

To dispose of the last first, the National Conference of Commissioners on Uniform State Laws has promulgated a model statute, designed to adopt the common law rule against perpe-

¹⁸¹See authorities cited in note 37 *supra*.

¹⁸²Leach, *The Rule against Perpetuities and Gifts to Classes*, 51 *Harv. L. Rev.* 1329 (1938); Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 *Harv. L. Rev.* 721 (1952); Tudor, *Absolute certainty of Vesting under the Rule against Perpetuities—a self-discredited relic*, 34 *Bost. Univ. L. Rev.* 129 (1954).

¹⁸³Leach, *The Rule Against Perpetuities and the Indiana Perpetuities Statute*, 15 *Ind. L. J.* 261 (1940).

¹⁸⁴For a critique of the recent California statutes, which bring the California statutory rule much closer to the common law, see Fraser and Sammis, *The California Rules Against Restraints on Alienation, Suspension of the Absolute Power of Alienation, and Perpetuities*, 4 *Hastings L. J.* 101 (1953). The recommendation of the writers: repeal of the balance of the California statutes and a complete return to the common law rule. *Id.* at 116-17.

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tuties as it has developed in the United States.¹⁸⁵ This statute has already been adopted in Wyoming¹⁸⁶ and California.¹⁸⁷

Turning to the question of repeal, the following code sections are integral parts of our statutory system, and clearly should be eliminated: 67-406; 67-407, and; 67-511 through 67-519. In addition, the conflicting definitions of contingent and vested interests in sections 67-320 and 67-321 must be dealt with. The Minnesota remedy was omission of the latter,¹⁸⁸ and that would seem to be an adequate solution. Finally, our statutory provisions limiting the purposes for which trusts of real property may be created will serve no useful purposes in the absence of our statutory rule against perpetuities. And it seems senseless to restrict the purposes of trusts of realty while permitting, as our codes do, trusts of personal property, "... for any purpose for which a contract may lawfully be made, ..." ¹⁸⁹ These restrictions only create traps for the unwary; indeed, they have already forced our Supreme Court to labor manfully, against adverse California authority, to save one testator's trust from invalidity.¹⁹⁰ Accordingly, it is submitted that sections 86-101 and 86-105 ought also to be repealed, and a provision substituted which will permit the creation of trusts of real and personal property for the same purposes.

III.

Conclusion

Panaceas from the cloister have traditionally been viewed with some suspicion by law students, lawyers and legislators alike. The suggestions herein made must bear that cross. Nonetheless, it is believed that the repeal of our statutory perpetuities system, and the substitution of the common law rule as suggested herein, would be a real service to Montana lawyers, and to their clients as well.

¹⁸⁵9A Uniform Laws Anno. at 262. Section 1 is as follows:

No interest in real or personal property shall be good unless it must vest not later than twenty-one years after some life in being at the creation of the interest and any period of gestation involved in the situation to which the limitation applies. The lives selected to govern the time of vesting must not be so numerous nor so situated that evidence of their deaths is likely to be unreasonably difficult to obtain. It is intended by the enactment of this statute to make effective in this state the American common law rule against perpetuities.

¹⁸⁶Wyo. Laws (1949) c. 92.

¹⁸⁷Cal. Stats. (1951) c. 1463 § 2. However, California still retains many features of the statutory system. See discussion at page 38 *supra*, note 134, *supra*.

¹⁸⁸Minn. Stats. (1953) § 500.12.

¹⁸⁹Rev. Codes Mont. 1947 § 86-206.

¹⁹⁰See *In re Strode's Estate*, 118 Mont. 540, 167 P. 2d 579 (1946).